STATE OF MICHIGAN

COURT OF APPEALS

CEDRONI ASSOCIATES, INC., Plaintiff-Appellant,	FOR PUBLICATION November 16, 2010
v	No. 287024 Genesee Circuit Court
TOMBLINSON, HARBURN ASSOCIATES, ARCHITECTS & PLANNERS, INC., Defendant-Appellee.	LC No. 08-088761-CK Advance Sheets Version

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

K. F. KELLY, J. (*dissenting*).

I respectfully dissent. The trial court correctly determined that plaintiff lacked a valid business expectancy in a potential governmental contract. In my view, plaintiff merely had a legitimate expectancy that the bidding process would be openly and fairly conducted and, thus, it had to establish fraud, injustice, or violation of trust in order to avoid summary disposition. Moreover, even assuming that the majority's framework of analysis is correct, plaintiff nonetheless failed to show that defendant did anything improper or that its conduct was anything other than the exercise of professional business judgment. Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendant.

I. STATEMENT OF FACTS

This action arises out of the bidder selection process for a construction project undertaken by the Davison School District that involved renovations and new construction at the Hill and Siple elementary schools (the project). In June 2003, the school district contracted with defendant to provide professional architectural and engineering services for the project. In addition to providing these services, defendant agreed to assist the school district in the administration and implementation of the project, to provide evaluations and recommendations during all phases of the project, and to help the school district obtain competitive bids. With regard to the competitive-bidding process, it was defendant's role to assist the school district with "bid validation or proposal evaluation and determination of the successful bid or proposal, if any." In this capacity, defendant was responsible for advertising the project and distributing bidding documents to prospective bidders and, if requested by the school district, for assisting in interviewing, selecting, and negotiating with prospective contractors. Defendant designated Jackie Hoist to act as its designated representative to assist the district with the project.

With respect to the competitive-bidding process, the school district's fiscal management policy (FMP) provides that bids shall be awarded consistently with applicable law. The applicable provision of law, MCL 380.1267, provides, in relevant part:

> (1) Before commencing construction of a new school building, or addition to or repair or renovation of an existing school building, except repair in emergency situations, the board of a school district . . . shall obtain competitive bids on all the material and labor required for the complete construction of a proposed new building or addition to or repair or renovation of an existing school building.
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> (2) The board . . . shall advertise for the bids required under subsection (1) by placing an advertisement for bids at least once in a newspaper of general circulation in the area where the building or addition is to be constructed or where the repair or renovation of an existing building is to take place and by posting an advertisement for bids for at least 2 weeks on the department of management and budget website on a page on the website maintained for this purpose or on a website maintained by a school organization and designated by the department of management and budget for this purpose. . . .
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> * * *
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> (6) At a public meeting identified in the advertisement for bids described in subsection (3), the board . . . or its designee shall open and read aloud each bid that the board . . . received at or before the time and date for bid submission specified in the advertisement for bids. *The board . . . may reject any or all bids*, and if all bids are rejected, shall readvertise in the manner required by this section. [Emphasis added.]

The FMP further provides that "[b]ids shall be awarded . . . to the 'lowest responsible bidder.'" The FMP indicates that the lowest responsible bidder, i.e., the responsible contractor that submits the lowest bid, is not necessarily the lowest overall bidder because that bidder might not be a responsible contractor. In determining who is a responsible contractor, the FMP directs the district's school board to rely on a variety of factors, including responsibility criteria and the recommendation of the architect. Responsibility criteria take into account a wide variety of information relating to a particular contractor, such as projects completed during the last three years, experience with projects similar to those being bid on, and references from third persons who have hired the contractor, and, importantly, the FMP defines a responsible contractor as a contractor "determined by the Board to be sufficiently qualified to satisfactorily perform the [c]onstruction project . . . ." Further, under the FMP, the board specifically reserves "the right to reject any or all bids, including the bid of any contractor who is not reasonably determined to be 'responsible' in conjunction with this policy."

In July 2007, defendant prepared a project manual for the project. The manual established a method by which the school district would procure bids on the project consistent with applicable law, see MCL 380.1267. It provided a bid advertisement, which required bidders to submit a bidder-qualification form with their proposals and indicated that "offer[s] will be required to be submitted under a condition of irrevocability for a period of thirty (30) days after

submission"[1] and that the "[o]wner reserves the right to accept or reject any or all offers." Bid instructions provided to applicants contained similar provisions.

In October 2007, plaintiff submitted a bid on the project. In its application, plaintiff identified five public-sector educational clients that it had completed projects for and a contact person for each of them, including (1) Irene Hughes Building, contact John Tagle, (2) Holly Academy, contact Les Hartzman, (3) Detroit Public Schools, contact Tim Rothermel, (4) Denby High School, contact Rob Marintette, and (5) Southwestern High School, contact Tom Miller. Plaintiff also identified three current or prior similar projects to those at issue here: (1) Holly Academy, contact Les Hartzman, (2) Madison Heights Library, contact Elizabeth Muzyk,[2] and (3) Warren Consolidated Schools, contact David Gassen. Plaintiff included the necessary contact information for each of these previous clients. Notably, Hoist had personal knowledge of plaintiff's work product because defendant had worked with plaintiff on the Holly Academy project.

On October 17, 2007, the school board opened all the contractors' bids. Of the six bids submitted, plaintiff's bid was the lowest. Defendant then checked plaintiff's references, and Hoist conducted interviews. Hoist spoke to several of plaintiff's identified contacts, including Tagle, Hartzman, Rothermel, Muzyk, and Gassen. She also spoke with Ken Kander, another person affiliated with the Holly Academy project; Jim Tomblinson and Bryan Hall, who had apparently worked with plaintiff on other projects; and two persons identified as Ron K and Aaron W. According to plaintiff, Kander and Hall were outside sources, while Tomblinson, Ron, and Aaron were affiliated with defendant. These people had differing opinions regarding plaintiff's work, both positive and negative. Apparently, Hoist made notes of these conversations, which provided:

> **Contact #1** – David Gassen – Partners in Architecture
> 2005 or 2006 thinks $600,000 Warren Consolidated Schools Service Center Connecting Links.
> Work was a tight schedule, people were in the building, He managed it well, hands on job, supervision was good, would work with them again. His firm has asked them to bid a lot of their jobs.
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> **Contact #2** – Jim Tomblinson
> 2003 or 2004
> State Island Lake State Park Toilet Buildings
> Cedroni didn't meet the project schedule
> Did not follow plans and specs
> Lack of supervision

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[1] Apparently, the purpose of the 30-day irrevocability period was to give the district time to determine whether bidders were responsible contractors.

[2] Elizabeth's surname was spelled "Muzyk" in plaintiff's documents and "Musyk" in defendant's documents.

No follow-up
Poor quality
He thinks the state put him on their "may not bid" list

Contact #3- Bryan Hall regarding a prime sub-contract – casework
Architectural Systems Group
Says Not good to deal with

Contact #4 – Tim Rothermel – ABC Paving
Detroit Public Schools Jayne Field Fieldhouse. $80,000 exterior and interior work, concrete, finishes, and cmu.
Worked for them but not recently, did a good job, very dependable, do what they way [sic] they will. Schedule was fine, they ended up getting into winter conditions but it was not Cedroni's fault.

Contact #5 – Elizabeth Musyk – Eares and Associates
$700,000 – City of Madison Heights Library, January 2007, grand opening was in July. Work was very good as a whole. Problems with the electrical sub who did not finish on time. Schedule lag. DTE got them behind as too. Did as much as possible to keep (on schedule). Very reasonable on change orders.

Contact #6 – John Tagle
Irene Hughes Building Alterations, Flint – State of Michigan job $100,000
Work quality was good, redid work when necessary. Did not follow documents closely. Fairly good. Paperwork end was good. Schedule – didn't meet deadlines but not all his fault. The fire marshal and the state agencies were involved. There were some things/issues created that didn't have to be created. He did things his own way, then they had to scramble and re-design

Contact #7 – Les Hartzman
Holly Academy, 2006 $260,000
Laughed, said he didn't have a problem with the guy. Would not hire him for this job.

Contact #8 – Ken Kander
2006 Holly Academy $260,000.
Declined to comment
I won't say anything negative but I won't say anything positive either.

Myself

Worked with him on several projects. Rochester [H]ills Maintenance addition, Rochester Hills Paths and Vault Toilets, and Holly Academy.

Some of the work at the Maintenance addition was the worst I'd seen – I told him that. Holly as [sic] lacking supervision and workmanship was poor. The quality

level received is reflective of their bid and about what I expected from Cedroni, but in addition to the low quality, his follow-up on construction issues, especially with regard to their lighting problem, is unacceptable to me.

Ron K. reminded me that the Paths and vaults project was so late that the owner almost lost their grant money and had to finish up the work themselves just to close out the contract.

Aaron W. reminded me that when we did pre-award interview at Holly – I warned him that past shortcomings will not be tolerated.

Ultimately, Hoist did not recommend plaintiff to the school district, and plaintiff was made aware that it had not been recommended. In response, Richard Cedroni, plaintiff's president, wrote a letter to "All Interested Parties" regarding the matter. In the letter, he stated:

> Jackie Hoist was forthcoming enough to let me know she intended to not recommend our company as general contractors for this project. I admire her frankness, but I obviously do not agree with her evaluation. . . . I have personally contacted all [our references] and all admitted to talking with Jackie. They all reported giving good reviews and glowing reports of our performance, except for one architect. After speaking with this architect and explaining to him that his comment could be viewed as damaging, he stated he didn't think his review was particularly bad and he would have no problem working with us in the future.
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> Quite truthfully, I was shocked to hear her intentions, as we have recently worked together to complete a classroom renovation at Holly Academy. The project was successfully completed on time, with the only difficulty coming from the state office of fire and safety. . . . I have spoken with [the] owner numerous times and he was very happy with our quality and performance on the project and would not hesitate to utilize our services again.
>
> Based upon my research, I have found no definitive reason as to why my company should not be recommended for this project. I am offering to complete this job at nearly $50,000 less than the next lowest bidder . . . . We have never been removed from a project and never received a poor review from any architect/owner we've worked with. Even after our last project with [defendant], I was told they had no issue with our performance and we could use them as a reference for future work.

On October 30, 2007, a district committee held a meeting regarding the bids. Cedroni appeared at the meeting, distributed copies of his letter, and addressed the committee. Plaintiff did not allege that the statements of the respective references were *not* made, or that Hoist had transcribed them inaccurately; rather, plaintiff merely disagreed with the content of the opinions expressed. Ultimately, the committee approved defendant's recommendation to award the contract to the second lowest bidder, "contingent upon review of" Cedroni's letter, and forwarded its recommendation to the school board. After further review, and based on the recommendations of the committee and defendant, the board awarded the contract to the second

lowest bidder, US Construction and Design Services, LLC. At the time, US Construction had an active contract with the school district and was performing in a satisfactory manner.

On May 20, 2008, plaintiff filed suit against defendant for tortious interference with business relations. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). After arguments, the court determined that plaintiff did not have a valid business expectancy because all the documentation indicated that the lowest overall bidder was not guaranteed to receive the contract and the board never implied that it would accept plaintiff's bid. The court also determined that there was no evidence indicating that defendant's conduct was improper. It therefore granted defendant's motion pursuant to MCR 2.116 (C)(10).

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under MCR 2.116 (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Badiee v Brighton Area Sch*, 265 Mich App 343, 351; 695 NW2d 521 (2005). "The motion may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Cummins v Robinson Twp*, 283 Mich App 677, 689-690; 770 NW2d 421 (2009) (quotation marks and citation omitted).

III. ANALYSIS

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendant on plaintiff's claim of tortious interference with a prospective economic advantage. I disagree. In my view, plaintiff failed to state a claim and otherwise failed to produce evidence of an intentional interference that caused a breach of the alleged business expectancy. In essence, plaintiff's claim is nothing more than dissatisfaction with the school district's ultimate choice of a contractor.

As noted by the majority, the requisite elements for tortious interference with advantageous business relationships or prospective economic relations are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy has been disrupted. At issue here are the first and third elements.

The first element requires proof of "the existence of a valid business relationship or the expectation of such a relationship between the plaintiff and some third party . . . ." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 254; 673 NW2d 805 (2003). A valid

business expectancy is one that is reasonably likely or probable, not merely hoped for. *First Pub Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003). The third element requires a plaintiff to prove "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Badiee*, 265 Mich App at 367 (quotation marks and citation omitted). "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (quotation marks and citation omitted).

A. PLAINTIFF FAILED TO ESTABLISH THAT DEFENDANT IS AN INDEPENDENT THIRD PARTY

Although the trial court dismissed plaintiff's claim on the basis of MCR 2.116(C)(10), I would also conclude that an additional basis for dismissal exists under MCR 2.116(C)(8). "To maintain a cause of action for tortious interference, the plaintiff must establish that the defendant was a 'third party' to the contract rather than an agent of one of the parties acting within the scope of its authority as an agent." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004), citing *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). The reason for this rule is common sense: An agent who is not acting solely on his or her own behalf, but is acting within the scope of an agency relationship, cannot be said to interfere with a business expectancy or contract because the agent's actions, as an arm of the principal, are imputed to the principal. Whether an agency relationship exists and the extent of its scope are questions of fact. See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 434-435; 683 NW2d 171 (2004) rev'd on other grounds 472 Mich 192 (2005).

Defendant was not a third party to the prospective contract; rather defendant was acting as the school board's agent. The contractual agreement between the school board and defendant directed defendant, at the school board's request, to assist the school board in the competitive-bidding process. Thus, defendant stood in a fiduciary relationship with the school board, and it was incumbent on defendant to act in good faith and in the school board's best interest when it assisted the school board in the selection of contractors for the project. Nothing in the record shows that defendant was acting solely for its own benefit, or otherwise outside its agency relationship with the school district, when it recommended that US Construction, instead of plaintiff, be awarded the project. And although there is some indication that Hoist had negative opinions of plaintiff's work, there is no indication that defendant's motives were strictly personal or that defendant would directly benefit from not recommending plaintiff. Accordingly, when defendant chose not to recommend plaintiff for the project, it did so as an agent of the school board rather than as an independent third party. As such, plaintiff's claim of tortious interference cannot lie against defendant. While this argument was never raised by defendant or addressed by the trial court, it alone provides a sufficient basis for dismissal and is an additional reason for affirming the trial court's decision.

B. PLAINTIFF HAD NO VALID BUSINESS EXPECTANCY

Next, even assuming that defendant could be liable for tortious interference, I would conclude, contrary to the majority's position, that plaintiff lacked any business expectancy, valid or otherwise. Plaintiff merely stood in the position of a "disappointed bidder" on a construction

contract. Michigan law makes clear that disappointed bidders for governmental contracts have no action at law to recover lost profits, let alone any protected interest in being awarded a governmental contract. See *Talbot Paving Co v Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896). As our Supreme Court has stated: "'The exercise of discretion to accept or reject bids [involving public contracts] will only be controlled by the courts when necessary to prevent *fraud, injustice or the violation of a trust*.'" *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), quoting 3 McQuillin, Municipal Corporations (2d ed), § 1340, p 919 (emphasis added). Accordingly, there is no cause of action for damages in connection with alleged improprieties in the highly discretionary process for awarding public contracts absent fraud, injustice, or violation of trust.[3] This principle is consistent with public policy—competitive bidding is designed for the benefit of taxpayers, not bidders, *Lasky v Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958)—and with the relevant statute, which provides the school district with absolute and unfettered discretion in determining whether to award a contractor a project, MCL 380.1267.[4] As such, because a bidder has no valid business expectation, or interest in a prospective economic advantage, when it submits a bid to a governmental entity that has full discretion in the award process, like the school board in the instant case, it cannot sue a nonagent third party for tortious interference with that alleged expectancy. Indeed, when the ultimate decision to enter into a business relationship is, by statute, a highly discretionary decision, a plaintiff cannot establish that its "business expectancy" was a reasonable likelihood or possibility and not merely wishful thinking. *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377-381; 354 NW2d 341 (1984). This is not to say that a lawsuit for tortious interference with discretionary governmental action can never succeed as the majority notes; however, the category of cases in which such a suit may lie is very narrow and must involve fraud, injustice, or violation of trust. Stated differently, while a plaintiff has no business expectancy in a bidding process that vests absolute discretion in the governmental authority, a plaintiff does have a legitimate expectancy that the bid it submits will be evaluated fairly and openly and will be subject to the same or similar scrutiny as other bids, so that the plaintiff's bid stands on an even playing field with all other bids.

Because the instant matter involves a claim of tortious interference with a business expectancy allegedly stemming from the school board's competitive-bidding process, the question becomes, What degree of discretion was allowed to the school district and was it such a high degree that no business expectancy could flow from the bidding process? By statute, the competitive-bidding process here was highly discretionary in nature. The statute provides no

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[3] *EBI Detroit, Inc v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2009 (Docket No. 277953). Although this case is not binding, MCR 7.215(C)(1), this Court may view it as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

[4] Section 1267 of the Revised School Code, MCL 380.1 *et seq*., establishes procedures that school districts must abide by when constructing a new school building. MCL 380.1267(6) requires bids to be read aloud at a public meeting and provides that "[t]he board, intermediate school board, or board of directors may reject any or all bids . . . ."

limiting criteria, and thus it can be said the discretion granted to the school board in awarding a contract for construction is unfettered and the broadest discretionary authority possible. See MCL 380.1267. Further, the fact that plaintiff was not awarded the contract even after it had a full and fair opportunity to be heard at a public forum supports my conclusion that the award of the contract to US Construction was a highly discretionary governmental activity in which "too many factors [were] in play to be able to reasonably infer that . . . plaintiff likely would have obtained the desired advantage." *Trepel*, 135 Mich App at 380. Accordingly, I would conclude, given the absolute discretion vested in the school district in regard to the bidding process, that plaintiff had no valid business expectancy; rather, it merely had an expectancy that its bid would be evaluated fairly and openly, absent any fraud, injustice, or violation of trust.

Implicit in this conclusion is my rejection of the majority's contrary position that the school district's discretion was limited. The bidding instructions clearly informed all bidders that the lowest bidder, or in fact any bidder, was not guaranteed to receive a contract. All the accompanying documentation related to the bidding process reiterated the board's full discretion to reject any and all bids. For example, the district's advertisement for bids provided, "Owner reserves the right to accept or reject any and all offers"; the instructions provided to bidders indicated that the board reserved the right to reject or accept any bids in its "best interest"; and, the FMP also contained language reserving the board's discretion to "reject any or all bids." I acknowledge, as the majority points out, that the FMP also mandates that the board select the "lowest responsible bidder." However, the majority's reliance on this language to conclude that the school district's discretion was limited, thereby creating a valid business expectancy in an exercise of discretionary governmental authority using principles of contract interpretation, is puzzling. The FMP did not have the force of law, and its distribution to all competing bidders did not create an enforceable contract or even an expectancy in a business relationship. Rather, in my view, the FMP is akin to an employer's policy manual and merely informs contractors how the school board intends to proceed in the selection process.

Turning to the instant matter, because plaintiff had no valid business expectancy, plaintiff had to show that defendant interfered with its expectation that its bid would be treated fairly in the bidding process, which required plaintiff to show fraud, injustice, or violation of a trust. There is no evidence in the record substantiating fraud, let alone any allegations that defendant engaged in any fraudulent or unjust activity. Indeed, plaintiff even *admits* that in Cedroni's letter to the school district, he was simply attempting to substitute his own judgment for that of the school district. While plaintiff may believe its president's judgment to be superior to that of the school board, the statute endows the school board, not plaintiff, with the discretion to award contracts in the school board's best interest.

Further, I find the majority's reliance on *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982), unpersuasive as support for its position that plaintiff had a valid business expectancy by virtue of its low bid. In that case, the defendant was the engineer for a project undertaken by the city of Detroit and, like defendant in this case, was to "evaluate bids made by contractors and make recommendations to the [city] as to which contractor should be awarded contracts." *Id*. at 624. Initially, the defendant recommended that the contract not be awarded to the plaintiff, the lowest bidder, because "it felt plaintiff was unqualified to perform the contract," and the contract was awarded to another bidder. *Id.* Subsequently, another contract was awarded to a different general contractor that "had designated plaintiff as its

proposed excavation and piling subcontractor." *Id*. at 624-625. At the defendant's direction, the plaintiff was removed as the subcontractor. *Id.* at 625. This Court held that the trial court had properly denied the defendant's motion for a directed verdict, concluding that the "plaintiff presented sufficient evidence to create a question of fact as to whether it was the lowest qualified bidder and thus had a legitimate expectancy in obtaining the contracts" at issue. *Id.* at 635.

While a superficial reading of *Joba Constr* suggests that it is applicable to this matter, I would conclude that its value as a guide to this Court is nonexistent. The *Joba Constr* Court never explained the nature of the evidence presented that gave rise to a legitimate business expectancy, and the Court never described what discretion, if any, the city of Detroit had to remove a subcontractor from the project. Thus, it is unclear whether the Court meant to suggest that simply being the lowest bidder in the bidding process is sufficient to establish a legitimate business expectancy or whether because the plaintiff had contracted with the general contractor and was already performing the role of a subcontractor it had some legitimate expectancy in the continuation of the same. Further, given the foregoing, the facts of *Joba Constr* are clearly distinguishable from the present matter. Here, plaintiff was never awarded a contract for the project through a general contractor and then subsequently removed from the project like the plaintiff in *Joba Constr*. Rather, the present matter is limited to the highly discretionary bidding process before a contract is awarded that school districts use when undertaking a school-construction project. Thus, the exact issue that was before the *Joba Constr* Court is not now before this Court. In any case, the decision in *Joba Constr* is not binding on this Court. Although a published opinion generally has precedential effect under the rule of stare decisis, MCR 7.215(C)(2), a rule of law established in a published opinion issued before November 1, 1990, need not be followed, MCR 7.215(J)(1).

More persuasive and on point is the case of *Mago Constr Co v Anderson, Eckstein & Westrick, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 183479).[5] In *Mago*, the plaintiff was the lowest bidder for a municipal contract. The defendant engineering consultant apparently recommended that the plaintiff's bid be accepted, but rescinded that recommendation when it was discovered that the plaintiff's bond was deficient, even though it turned out that every bidder's bond was nonconforming. *Id*. at 1-2. This Court affirmed the trial court's grant of summary disposition in favor of the defendant, ruling, in part, that the evidence did not establish that the plaintiff had a legitimate expectation of receiving the contract. *Id.* at 2. It explained:

> Where the ultimate decision to enter into a business relationship is a highly discretionary decision reposed within the structure of a governmental entity, it becomes more difficult for a plaintiff to prove that it had an expectancy of doing business with the governmental body. Here, the fact that [the second lowest bidder] was awarded the contract at a city council meeting after all interested parties were given a chance to be heard supports the view that the

[5] Again, while I recognize this case is not binding precedent, MCR 7.215(C)(1), I do view it as persuasive. See *Dyball*, 260 Mich App at 705 n 1.

> award of the contract was a highly discretionary governmental activity in which "too many factors [were] in play to be able to reasonably infer that . . . plaintiff would have obtained the desired advantage." Moreover, the bidding instructions clearly informed plaintiff that the lowest bidder was not guaranteed to receive the water main improvement contract. Lastly, the fact that plaintiff submitted a nonconforming bid should have negated any expectation that it might have had regarding the possibility of receiving the contract. [*Id.* at 3 (citations omitted).]

Apart from the bond issue, *Mago* is identical to this case. Plaintiff knew from the outset that the lowest bidder was not guaranteed to be awarded the contract, that the selection of the winning bidder depended on the evaluation of numerous criteria, and that the decision was made at a public meeting at which interested parties, including plaintiff, were permitted to speak.

An additional case I find persuasive is *EBI-Detroit, Inc v Detroit*, 279 Fed Appx 340 (CA 6, 2008), in which the plaintiff was the low bidder on a project commissioned by the Detroit Water and Sewer Department (DWSD) and its bid was rejected. *Id.* at 343. The plaintiff filed suit in the Wayne Circuit Court, and the defendants removed it to federal court. Regarding the plaintiff's state-law claim for tortious interference against two of the DWSD's directors, the appellate court held that the plaintiff did not have a valid business expectancy. *Id.* at 352-353. It explained:

> [H]owever one describes EBI's relationship with DWSD, it is not the kind of relationship that can support a tortious interference claim. Michigan courts have already rejected the idea that a disappointed bidder has a valid business expectancy in a potential government contract. *Timmons v. Bone*, [unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 228942)] 2002 WL 745089, at *2 (Mich.Ct.App. April 23, 2002). We agree, and note that holding otherwise would give any low responsive bidder an immediate business expectancy in the government contract at issue. EBI had a "unilateral hope" of winning the contract, nothing more, so its tortious interference claim cannot proceed. [*Id.*]

In summary, given that the school board expressly reserved the right to reject any bid under MCL 380.1267, I conclude that while plaintiff's status as the lowest bidder created the mere *possibility* that it would be in contention to be awarded the contract, it did not create a reasonably likely or probable expectation that it would, in fact, be awarded the contract. Because plaintiff had no business expectancy in the highly discretionary bidding process and it only had an expectancy that its bid would be treated fairly, it was required to come forward with some evidence of fraud, injustice, or violation of trust. It failed to do so, and therefore the trial court properly granted defendant summary disposition under MCR 2.116(C)(10).

C. PLAINTIFF DID NOT ESTABLISH INTENTIONAL INTERFERENCE

Even assuming that the majority's framework of analysis is correct, i.e., that plaintiff had some valid business expectancy, I would nonetheless conclude that plaintiff's claim fails on the third element necessary to establish a claim of tortious interference. The claim requires proof that the defendant intentionally interfered with the existence of a valid business relationship or expectancy and that the interference induced or caused a breach or termination of the relationship

or expectancy. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996); *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). In addition to being intentional, the interference must be improper, i.e., illegal, unethical, or fraudulent. *Trepel*, 135 Mich App at 374. To prove that the defendant acted improperly, the plaintiff must show the intentional doing of an act that is wrongful per se or the intentional doing of a lawful act with malice and unjustified in law. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). If the plaintiff relies on the intentional doing of a lawful act done with malice and unjustified in law, the plaintiff "must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Laboratories*, 217 Mich App at 699. The defendant does not act improperly when its actions are motivated by legitimate business reasons. *Id*. Plaintiff does not and did not meet this burden; it has shown neither interference nor causation.

1. INTENTIONAL INTERFERENCE

Plaintiff contends that a question of fact existed regarding whether defendant provided the school board false information. I disagree. Plaintiff fails to identify any evidence in the record substantiating this claim. Plaintiff's argument seems to rely on Hoist's notes from the reference checks, which related to projects plaintiff worked on. However, there is no evidence in the record indicating that Hoist's notes contained false reports. Noticeably absent from the record is any affidavit or proof that Hoist's notes were made up, slanted, or created out of whole cloth. In fact, plaintiff has never asserted that the comments recorded in Hoist's notes were not actually made. Indeed, Cedroni's letter to the school district made no such allegations, but simply asserted that he disagreed with the references. Plaintiff chose not to submit any affidavits from these references asserting that they had provided glowing references of plaintiff's work or that they never made the statements recorded in Hoist's notes. A party cannot create a question of fact to avoid summary disposition by mere allegations or promises that a claim will be supported by evidence at trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 377; 775 NW2d 618 (2009). Plaintiff's reliance, as well as the majority's reliance, on Cedroni's letter to create a question of material fact is simply erroneous because the letter contains inadmissible hearsay within hearsay. *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010) (noting the well-established rule that when reviewing a motion to dismiss based on MCR 2.116(C)(10), only evidence that is admissible is considered).

Further, it is obvious from the record that plaintiff and defendant have had disagreements in the past while working together on previous projects and that their relationship was contentious at times. Considering that the parties worked together on complex, large, and costly construction projects, it is not difficult to imagine professional disagreements occurring. Plaintiff's attempt to blame defendant for the professional disagreements, however, does not create a legitimate question of fact, absent some other substantiating evidence, that defendant acted on improper motives. As noted, a plaintiff must identify specific affirmative acts that corroborate the alleged improper motive. *BPS Clinical Laboratories*, 217 Mich App at 699. A review of the record, in a light most favorable to plaintiff, reveals that this evidence is lacking.

At best, the most that can be inferred is that Hoist had a negative opinion of plaintiff's work on the basis of prior experience. Reporting that information to the school board, however, was not malicious or wrongful conduct; rather, defendant was merely acting within its capacity to make recommendations to the school district, as was required under its contract with the school district. There simply is no question that defendant's actions were justified as actions based on a legitimate business decision. Accordingly, plaintiff has failed to establish any question of material fact that defendant acted improperly.

2. CAUSATION

Even if defendant had acted improperly, however, plaintiff has failed to show that this allegedly improper conduct actually interfered with plaintiff's supposed business expectancy. Defendant's recommendation was but one factor that the school district was to consider in determining which contractor to award the contract. After receiving defendant's recommendation and Cedroni's letter, a district committee considered the recommendation and the letter. The committee then made a recommendation to the school board, which, in turn, consistenly with the FMP, considered a number of responsibility criteria, defendant's recommendation, and Cedroni's letter. As noted, the responsibility criteria take into account a wide variety of information relating to a particular contractor, such as projects completed during the last three years, experience with projects similar to those being bid on, and references from third persons that have hired the contractor. Discretion was vested in the board to select the contractor that it viewed to be qualified to perform the job. The school board ultimately selected the second lowest bidder, US Construction, which at that time had an active contract with the school district and was performing well. In other words, defendant's recommendation was only one factor taken into account when the board made its determination. Defendant has presented no evidence showing that the board relied solely on information submitted by defendant or that, absent the recommendation, plaintiff would have been awarded the contract. Accordingly, plaintiff has also failed to establish causation. See *Barnard Mfg*, 285 Mich App at 377 ("[A] party 'may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided [in MCR 2.116], *set forth specific facts* showing that there is a genuine issue for trial.'") (citation omitted).

IV. CONCLUSION

In my view, the trial court properly granted summary disposition for defendant. Plaintiff never established that defendant was an independent third party. Rather, in recommending that the school board reject plaintiff's bid, defendant was acting as an agent of the school board. Thus, plaintiff failed to state a claim on which relief could be granted. *Reed*, 201 Mich App at 13. Even if this were not the case, I would conclude that plaintiff lacked any valid business expectancy. The school board's decision was highly discretionary and, by statute, it had broad and unfettered discretion to reject any or all bidders. Thus, none of the bidders in the bidding process had any prospective advantage or business expectancy; rather, each of their interests was limited to an expectancy that the bidding process would be fair and free of fraud. To sustain a claim of tortious interference on this basis, a party must show fraud, injustice, or violation of trust in the bidding process. Plaintiff made no such showing here. Even if the majority's framework of analysis were correct, plaintiff failed to show that defendant's conduct was malicious or wrong or that defendant's allegedly wrongful conduct caused plaintiff to lose the award of the contract. Plaintiff is merely a disappointed bidder in the competitive-bidding

process that believes its judgment should be substituted for that of the governmental agency. The majority's opinion sanctions this position. In effect, it will allow all disgruntled bidders for governmental contracts to state a claim of intentional interference with a business expectancy against the government's agent based on the agent's negative professional opinion of the claimant. Unfortunately, the majority has failed to see this lawsuit for what it really is: plaintiff's attempt to punish or obtain damages from defendant for expressing its opinion that plaintiff performed poorly on previous projects.

I would affirm.

/s/ Kirsten Frank Kelly